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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1061

JAMES E. CURRY,

Petitioner,

v.

ROBERT E. SHER AND ABRAHAM J. HARRIS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Pro Se

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I, the undersigned petitioner, James E. Curry, attorney at law, *pro se* hereby petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit dismissing "for lack of an appealable order" my appeal from an order of the United States District Court for the District of Columbia denying my motion to vacate a prejudgment writ of attachment. Said writ had been issued and levied without notice to me

and, as I alleged, was utterly void and issued without jurisdiction because not supported by the affidavit required by the law of the District of Columbia.[1]

(a) Opinions Delivered in the Courts Below

No opinions were delivered in the courts below.

(b) Grounds of Jurisdiction

(i) A copy of the Order of the District Court of October 16, 1969 is attached as Appendix A. The date of the judgment or decree of the Court of Appeals sought to be reviewed is June 24, 1970. A copy thereof is attached as Appendix B.

The order appealed from contains an additional paragraph in which the court purports to deny a previous motion of mine for extension of time to file my brief as appellant. This part of the order is not to be considered by this Honorable Court, nor should it be deemed a justification for refusing to review the part that dismisses my appeal "for lack of an appealable order." The extra paragraph is nugatory (except as it may reflect judicial failure carefully to examine the case papers) because on February 25, 1969 the court had granted my motion for extension of time for filing my brief until 30 days "following the court's ruling on appellees' motion to dismiss the appeal, in the event said motion is denied."

(ii) A timely motion for rehearing was filed in the Court of Appeals. It was denied by order of September 8, 1970. A copy of said order is attached as Appendix C.

(iii) The statutory provision believed to confer jurisdiction on this court is Title 28 United States Code §1254(1). No extension of time for filing this petition has been requested.

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[1] District of Columbia Code Title 16 §501.

(c) Question Presented for Review[2]

The question presented for review is whether an order of the District Court for the District of Columbia is appealable to the Court of Appeals under Title 28 §1291 of the U.S. Code, said District Court order having denied a motion to vacate or dissolve a prejudgment writ of attachment which had been issued without notice to the undersigned defendant and levied against certain funds and which, as this defendant alleged, was utterly void and without jurisdiction because it was not supported by the affidavit required by District law.

(d) Constitutional and Statutory Provisions

The constitutional and statutory provisions which the case involves are:

a. The Fifth Amendment of the Federal Constitution which declares that no person shall "be deprived of life, liberty or property without due process of law." This amendment can be found at page XLVI of Volume 1 of the official edition of the United States Code.

b. Title 28 §1291 of the United States Code, copy of which is attached hereto as Appendix D. Said provision can be found at Volume 7 page 5959 of the official edition of the United States Code.

(e) Statement of the Case

In this case Mr. Sher (and his partner Mr. Harris) sued me for attorneys' fees. The case is still pending for trial on the merits in the District Court. When filing his complaint, Sher also filed a separate ancillary proceeding for attach-

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[2]Note that the question presented for review does not include the matter of the validity of the attachment. This will be decided by the Court of Appeals if this Honorable Court sees fit to reverse that Court's order dismissing my appeal.

ment which was levied without notice to me upon certain Indian trust funds in which I had a contingent interest and which were held by Attorney I.S. Weissbrodt in trust under orders of the Indian Claims Commission[3] and an order of the District Court[4] in the case of *Cohen v. Curry*. Sher did not support his attachment writ with the affidavit required by the law of the District.[5] I moved for dissolution or vacation of the writ on the ground that it was utterly void and issued without jurisdiction. The District Court denied my motion. I appealed. Sher moved to dismiss my appeal for lack of an appealable order under Title 28 § 1291 of the United States Code. Before my brief on appeal was due to be filed, the Court granted Sher's motion.[6] I filed a motion for rehearing which was denied.[7] No opinion was issued on either order although Mr. Sher had filed numerous pleadings and memoranda in support of his motion and I had filed many in opposition. The order of the court shows by clear implication that much of this material was disregarded by the Court. I now seek certiorari to review the order dismissing my appeal so that the Court of Appeals will be required to give consideration to it.

* * * * *

The above is a bare-bones statement of the case itself. Points I, II, and III of my argument will show why it is sufficiently important to justify intervention by this Honorable Court. But its most profound importance stems from its integral relationship with the case of *Cohen v. Curry*[8] which

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[3]E.g. *Northern Paiute Nation v. U.S., 20 Indian Claims Commission*, 414-432, especially first full paragraph on page 418.

[4]R-20, February 11, 1969, *Cohen v. Curry*, No. 24340 in the United States Court of Appeals for the District of Columbia Circuit.

[5]See footnote 1 above.

[6]Order of U.S. Court of Appeals, D.C. in *Sher v. Curry*, No. 23,780, June 24, 1970.

[7]Order of U.S. Court of Appeals, D.C. in *Sher v. Curry*, No. 23,780, September 8, 1970.

[8]No. 24,140, U.S. Court of Appeals, D.C.

is also pending in the Court of Appeals. It would be easier for this Honorable Court to disregard this connection but if so it would be shutting its eyes to extremely important facts on the record.

The *Cohen* case is based on a bitter squabble between me and several other lawyers, including incumbent Congressman Jonathan B. Bingham of New York and Felix S. Cohen, former top Indian-affairs lawyer in the Department of the Interior as to which of us shall share in certain Indian tribal recoveries in claims cases filed by me during the Forties and Fifties. The Cohen case involves not only the sacred obligations of Uncle Sam to his Indian wards but also the high duty of the government to protect all the people from corruption on the part of such public officials.

Sher purported to be my personal attorney in the Cohen case. I discovered that he had appropriated some of the money in dispute and was holding it in his own name, purportedly as an "escrow agent" for the opposite parties. For this gross infidelity to duty I fired him and he returned the misappropriated funds. But he then sued me for $10,000 in fees and attached part of the same Indian trust funds that were in dispute in the case. He thereby made himself in effect a party to the sordid lawyers' wrangle over Indian money that is involved in the *Cohen* case. His attachment thereby assumes all the elements of public importance that exist in the *Cohen* case.

The *Cohen* case, like the *Sher* case was a suit for attorneys' fees. It was filed against me to enforce the alleged rights of Congressman Bingham, Associate Solicitor Cohen, and a cousin of Felix Cohen named Henry Cohen. Bingham alleged that he "remembered" doing 100-200 hours of work on certain of the claims back in 1947. He had never submitted his fee claim to the Claims Commission. He did not assert that the work was ever reported to me as attorney of record in the cases until the suit was filed more than twenty years later. The suit was filed in January, 1969, not by Bingham but by Ceil Bryson Cohen who claims to be the

widow of Henry Cohen and the "assignee" of Felix Cohen and of Bingham.

By the time the *Cohen* suit was filed, I had transferred my duties as attorney of record in the claims cases to I.S. Weissbrodt. After the suit was filed, the Claims Commission made an award in one of the cases and an award of attorneys' fees in the amount of a million and a half dollars.[9] Meanwhile, the District Court had entered an order requiring that portions of said fees be held in trust pending the outcome of the *Cohen* case[9a] which order was duly noted in the Claims Commission order. In its order, the Claims Commission provided for payment of the fees to Weissbrodt for distribution to various lawyers, including myself, subject to the order of the District Court.

While these Indian moneys were in the hands of Weissbrodt for a few days, before his compliance with the order of the District Court, Sher executed his attachment writ against them. The intervening transfers in trust were all executed by or under orders of federal agencies, i.e. the Treasury, the Claims Commission, the District Court, etc. These were all acts attributable to the original trustee, i.e., the federal government. Therefore the funds remained impressed with the original trust in favor of the Indians. The funds have never come into my hands. As will be shown below in this Statement, the interest of the Indians in the outcome of the Curry-Cohen-Bingham-Sher-Weissbrodt dispute is not merely theoretical but very real and substantial.

When the *Cohen* case was first called for trial, the lower court announced *on the record*[10] that "if conduct like this

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[9] *Northern Paiute Nation v. U.S. 20 Indian Claims Commission*, 414 to 432, especially page 432.

[9a] Order, February 11, 1969, R-20, *Cohen v. Curry*, United States Court of Appeals, D. C. No. 24,140.

[10] Transcript of Hearing, May 21, 1969, *Cohen v. Curry*, United States Court of Appeals, D.C. No. 24,140, R-35, Vol. A pages 1-8, at pages 2 and 4.

is publicized it reflects on the Bar in the eyes of the general public" and that the court "could not guarantee freedom from publicity in a public courtroom." The *Cohen* case has never been tried on its merits. Instead a "supplementary proceeding" was devised and conducted from which evidence as to the actual rights of Bingham and Cohen was carefully and strictly excluded. I represented myself in that proceeding.

Plaintiff contended (with the support of my defecting attorney, Sher) that I had made an alleged "oral" stipulation to pay $150,000 for the work alleged by Bingham, i.e. at the rate of $1,500 per hour. Another witness said I had agreed "by a nod of the head." I repudiated and denied the oral agreement. But the lower court judge made many prejudicial rulings, including one in which he specifically instructed the jury (contrary to the fact) that I myself "contended" that the agreement had been made for me by Sher. So the verdict and judgment went against me.

In my appeal from the Cohen judgment,[11] I contend that the $1,500-per-hour award for Bingham's services is unconscionable and that the lower court refused to permit this issue to be tried; that the court excluded evidence tending to show perjury by Bingham's assignee; and that the judge falsely informed the jury as to my own contentions. I also contend[12] that the award violates numerous federal laws[13] intended to protect the Indians from claims brokerage, exorbitant fees and other abuses by Indian tribal attorneys and their cronies among the Congressional and executive officials who control and oversee the administration of Uncle Sam's Indian trust obligations. I also invoke the federal conflict-of-interest laws,[14] the federal anti-assignment

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[11] Brief of Appellant, November 12, 1970, *Cohen v. Curry*, No. 24,140, U.S. Court of Appeals, D.C.

[12] *Id.*, pages 23-53.

[13] United States Code, Title 18 §§ 2, 438; Title 25 §§ 70-70w, 81-85; 48 Stat. 984; 49 Stat. 388; Code of Federal Regulations, Title 26 §§ 71, 72.

[14] United States Code, Title 18, §§ 205, 207.

law,[15] the applicable statute of frauds[16] and the rules of the District Court which forbid enforcement of oral stipulations.[17]

The interest of the Indians (whom the lower court refused to let me implead) arises from the illegalities above mentioned. I contend that if the arrangements on which the judgment in *Cohen* was based were corrupt and illegal, the fruits thereof should not go to those who participated in the corruption, namely Bingham, the three Cohens and Sher. And if I am found myself to have participated in them, neither should the moneys be paid to me. Instead of paying the money to the culprits, it should be retained by the government in trust for the Indians who were the original victims of such corrupt and unethical practices.

I will show in my argument on Point IV below why the circumstances above stated lend this case sufficient importance to justify the requested writ of certiorari. In other arguments I will show why, even regardless of said circumstances, the Sher case alone and of itself is of importance sufficient to justify the requested writ.

Pursuant to Rule 23(g) of his Honorable Court, I state that the basis for federal jurisdiction of the court of first instance (i.e. the District Court of the District of Columbia) is to be found in Title 11 Ch. 5 of the District of Columbia Code at page 606 in Volume 1.

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[15] United States Code, Title 31, § 203, District Court, D.C. Rule 3.

[16] District of Columbia Code, 1967 Ed., Title 28, § 3503.

[17] Local Rules, U.S. District Court, D.C., Rule 3.

ARGUMENT

POINT I

THE COURT OF APPEALS DECIDED THE QUESTION PRESENTED HEREIN FOR REVIEW IN A WAY THAT CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER AND IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THE U.S. SUPREME COURT.

The question presented for review (as to whether orders confirming void prejudgment attachments and garnishments, etc., are appealable under jurisdictional acts like that of the Court of Appeals[18]) is an abstruse one that has confused many lawyers and judges. It was never clear that *defendants* could appeal such orders until the decision in the *Baxter* case in the 8th Circuit.[19] This case was decided on February 3, 1969. The *per curiam* opinion of Judges Lay, Gibson, and Harper contains an excellent analysis of previous Supreme Court decisions relating to the same topic.[20]

In the *Baxter* case a petition for certiorari was filed in this Court which was denied on May 5, 1969.[21] On June 9, 1969, this Court entered its decision in the *Sniadach* case.[22] Both the *Baxter* case and the *Sniadach* case were in all relevant respects similar to the one here under consideration. While the opinion in *Sniadach* did not mention the question of appealability the case was heard by this Court

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[18]United States Code, Title 28, § 1291.

[19]*Baxter v. United Forest Products*, 406 F.2d 1120.

[20]*Id.*, page 1123, third full paragraph to p. 1124; also p. 1125, first and second full paragraphs; also page 1126, last paragraph, to page 1127.

[21]*United Forest Products v. Baxter*, 394 U.S. 1018, Term No. 1251, 23 L.Ed. 2d 42, 89 S. Ct. 1635.

[22]*Sniadach v. Family Finance Corporation*, 305 U.S. 237, 23 L. Ed. 2d 349, 89 S. Ct. 1820.

under its jurisdictional act[23] which limits it to the consideration of "final" decisions, the same limitation that is imposed by the jurisdictional act of the Court of Appeals.

The *Baxter* case was ignored by my opponent in his motion to dismiss my appeal.[24] Its applicability was argued by me at length in my Response[25] and the *Sniadach* case was cited in an addendum thereto.[26] On February 26, 1970, the Court of Appeals for the Second Circuit issued a decision in the *West* case[27] in which it asserted that such orders as are here involved are not appealable. My opponent then filed a supplemental memorandum[28] in support of his motion to dismiss in which he continued to ignore the *Baxter* decision but quoted at length from *West*.

I filed a response[29] to his supplemental memorandum. This showed, with copies of the original record in *West*, that Judge Friendly did not even have before him the kind of order that is involved in the present case but an entirely different one as to which only local statutory considerations were relevant. My response also analyzed Judge Friendly's decision at great length and showed how extensively it conflicts with applicable prior decisions in the Supreme Court and elsewhere. There is further analysis of these decisions, especially *Sniadach*, in my petition for rehearing.[30] I understand that it is unsuitable to repeat such arguments here, but even a cursory examination of the *Sniadach* and *Baxter*

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[23] United States Code, Title 28, § 1257.

[24] *Sher v. Curry*, U.S. Court of Appeals, D.C. No. 23,780, February 2, 1970.

[25] *Id.*, February 12, 1970.

[26] *Id.*, March 4, 1970.

[27] *West v. Zurhorst*, 235 F.2d 919.

[28] *Sher v. Curry*, U.S. Court of Appeals, D.C. No. 23,780, April 6, 1970.

[29] *Id.*, May 13, 1970.

[30] *Id.*, July 8, 1970.

cases will reveal that they conflict with the order of the Court of Appeals in the present case.

POINT II

THE DECISION OF THE COURT OF APPEALS WOULD DEPRIVE DEFENDANTS IN ATTACHMENT AND GARNISHMENT CASES OF THE CONSTITUTIONAL PROTECTION GIVEN THEM BY THE SUPREME COURT.

With special reference to wage garnishments, this Honorable Court held in *Sniadach*[31] that "it needs no extended argument to conclude that absent notice and prior hearing, this prejudgment garnishment procedure violates the fundamental principles of due process." There was much discussion in Mr. Justice Douglas' opinion about the "inhuman" results of said garnishments as they affect wage earners. But there is nothing in the decision to indicate that the ruling applies any less to earners of legal fees. If such a distinction should be made, then an additional reason exists for requiring review by the Court of Appeals of the decision of the District Court in the present case.

If the Appeals Court's refusal to review is permitted to stand, it will deprive wage-earners in the District of Columbia of the benefit of the principles set forth in the *Sniadach* decision. District Court judges may well be expected not to take *Sniadach* very seriously if they know that their prejudgment garnishments cannot be attacked unless and until the defendant goes through the long process of trial and judgment of the main claim against him.

Furthermore, at least as in my case, it is doubtful if appeal of such decisions would *ever* be available. If I should lose in the main case and a judgment should be entered against me, I could ask for review of the attachment writ in connection with my appeal from the final judgment. But if I

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[31] See footnote 22 above.

should win that trial, which I hope to do, I will have no adverse order to appeal from except the attachment writ; and the time for appealing that order will have expired. Like the defendant in *Sniadach*, I would again be deprived of due process of law.

POINT III

BY DISMISSING MY APPEAL AND DENYING MY PETITION FOR REHEARING, WITHOUT ANY OPINION THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The impropriety of the failure of the Court of Appeals to issue an opinion in this case is emphasized by the arbitrary actions of the lower court in the related *Cohen* case, as outlined in the above Statement of the Case. The lower court in the present case also threatened me with citation for contempt of court when I attempted to argue the invalidity of the attachment.[32] This sort of attitude bodes very ill for the treatment I may expect in future proceedings in both cases.

This Honorable Court has said[33] that "we have repeatedly emphasized the importance of a statement of the grounds of decision, both as to facts *and law*, as an aid to litigants and to this court" (underlining added). In that case, the Court vacated the order and remanded it to the court below "for findings and conclusions appropriate to a decision . . . ."

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[32] See Response, page 8, February 12, 1970 in *Sher v. Curry*, U.S. Court of Appeals, D.C. No. 23,780.

[33] *Public Service Commission of Wisconsin, et al. v. Wisconsin Telephone Co.*, 289 U.S. 67, 53 S. Ct. 514, 77 L. Ed. 1036.

The proper "course of judicial proceedings" is also described in the Canons of Judicial Ethics of the American Bar Association which provide[34] that:

> In disposing of controverted cases, the judge shall indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids suspicion of arbitrary conclusions, promotes confidence in his intellectual integrity and may contribute useful precedents to the growth of the law.

As set forth in my motion for rehearing[35] the text of Judge Fahy's order dismissing my appeal clearly itself implies that he failed to examine several of the memoranda filed by me and the important arguments that they contain.

I have had only one previous case before His Honor, one[36] which concerned the constitutional rights of a group of people holding unpopular religious views. That appeal was also dismissed without opinion. My clients lacked the funds to file a petition for certiorari. I don't know whether His Honor follows this practice habitually but at least in my limited experience he follows it consistently.

Such irregular practices bespeak a tendency to arrogate to the Circuit Court of Appeals, or at least to its Senior Judge, some of the prerogatives of the Supreme Court of the United States. Certainly it is true, as stated in the rules[37] that "a review on writ of certiorari is not a matter of right." But this is because of the special circumstances of the Supreme Court which do not exist in the Courts of Appeals.

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[34]Canon 19, Canons of Judicial Ethics, American Bar Association, adopted July 9, 1924.

[35]*Sher v. Curry*, U.S. Court of Appeals, D.C. No. 23,780, July 8, 1970.

[36]*Stevens v. Summerfield, Postmaster General*, May 22, 1958, 257 F.2d 205, 10 U.S. App. D.C. 201.

[37]Rule 19, Rules of the United States Supreme Court Effective July 1, 1970.

In cases where the issues are entirely clear, of course, or in cases where the issues have recently been decided, opinionless decisions may be justified. But otherwise such decisions, as the Bar Association says, create "suspicions of arbitrary conclusions" and destroy "confidence in the intellectual integrity" of the court. To this extent they may well constitute a substantial denial of review, which denial is not within the discretion of the Court of Appeals.

POINT IV

THIS CASE INDIRECTLY INVOLVES IMPORTANT CONSIDERATIONS OF LAW AND PUBLIC POLICY INHERENT IN FEDERAL GUARDIANSHIP OVER INDIANS AND IN THE PREVENTION OF GRAFT AND CORRUPTION IN CONNECTION THEREWITH.

Because of the circumstances set forth in the Statement of the Case, the American Indians and the federal government have a deep interest in the outcome of the Curry-Cohen-Bingham-Sher-Weissbrodt dispute of which the present case is one phase. The relation of the federal government to the Indians is well described by Felix S. Cohen in his standard work on the subject.[38] He quotes from the *Kagama* case[39] wherein this Honorable Court so early stated:

> These Indian tribes *are* the wards of the nation. They are communities dependent on the United States . . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises a duty of protection, and with it the power. This has always been recognized by the Executive and by Congress and by this court, whenever the question arises.

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[38] Cohen, *Handbook of Indian Law*, U.S. Department of the Interior, Office of the Solicitor, 1945, pages 169-73, especially page 170.

[39] *United States v. Kagama*, 118 U.S. 375 (1888), 30 L. Ed. 228.

Surely nothing involves higher considerations of public policy than the faithful exercise by the government of its sacred duty to its wards, especially when it is coupled with the duty to the entire nation to prevent corruption in government. The Supreme Court of the United States shares these obligations with the other branches of government.

CONCLUSION

This Court should grant certiorari, the order dismissing the appeal should be reversed, and the Court of Appeals should be required to hear my appeal on its merits.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT E. SHER, et al.,

Plaintiffs,

v. Civil Action No. 1589-69

JAMES E. CURRY,

Defendant.

O R D E R

This cause came on for hearing on October 9, 1969, on defendant's motion to dissolve attachment and for extension of time and on plaintiffs' motion for default judgment, and the Court having heard the argument of counsel and being fully advised, it is

ORDERED that the said motion of defendant and the said motion of plaintiffs be and they are hereby denied, and it is

FURTHER ORDERED that the defendant shall have ten days from this date to serve and file his answer to the complaint.

Dated this 16 day of October 1969.

/s/ John J. Sirica
Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,780

SEPTEMBER TERM, 1969

Robert F. Sher and
Abraham J. Harris

Civil 1589-69

v.

James F. Curry,
Appellant

Before: Fahy, Senior Circuit Judge; Tamm and Robinson, Circuit Judges; in Chambers.

O R D E R

On consideration of appellees' motion to dismiss this appeal for want of jurisdiction, of the responsive pleadings filed with respect thereto and on consideration to appellant's motion for an extension of time within which to file appellant's brief, it is

ORDERED by the Court that appellees' aforesaid motion to dismiss be granted and this appeal is hereby dismissed for lack of an appealable order and, it is

FURTHER ORDERED by the Court that appellant's motion for extension of time within which to file appellant's breif is denied.

Per Curiam

Circuit Judge Robinson did not participate in the foregoing order.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,780 SEPTEMBER TERM, 1969

Robert E. Sher and
Abraham J. Harris

Civil 1589-69

v.

SEP 8 1970

James E. Curry,
Appellant

Before: Fahy, Senior Circuit Judge; Tamm and Robinson, Circuit Judges, in Chambers.

ORDER

On consideration of appellant's *pro se* petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid *pro se* petition is denied.

Per Curiam

For the Court
NATHAN J. PAULSON
Clerk

APPENDIX D

§ 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.